SERVED: June 29, 1992

NTSB Order No. EA-3601

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of June, 1992

Application of MARK J. CROSS for an award of attorney and expert consultant fees and related expenses under the Equal Access to Justice Act (EAJA).	Docket 90-EAJA-SE-10020

OPINION AND ORDER

The Administrator has appealed from the written initial decision of Administrative Law Judge William E. Fowler, Jr. issued on January 29, 1990.[1] In that decision, the law judge awarded petitioner (respondent) $10,868.60 in attorneys' fees and expenses. We grant the appeal and vacate the award.

Petitioner was initially charged with violations of Federal Aviation Regulations § 61.59(a)(1) and (2) ("FAR," 14 C.F.R. Part 61).[2] The Administrator's February 7, 1989 order proposed to

[1]The initial decision is attached.

[2]§ 61.59(a)(1) and (2) read:

§ 61.59 Falsification, reproduction, or alteration of

revoke petitioner's commercial pilot and certified flight instructor certificates.

Prior to hearing, the parties settled the matter. Although a written settlement agreement is not in evidence,[3] there is no dispute that, in return for the Administrator withdrawing the complaint and revocation order, petitioner agreed not to seek fees and expenses under EAJA.[4] Despite this agreement, and after the law judge dismissed the complaint at the Administrator's request, petitioner sought compensation under EAJA, claiming that he had been coerced into the settlement and, therefore, it should not preclude an award.

The law judge apparently agreed, but did not so find directly. He stated:

> There is apparently little if any, direct evidence against the applicant, and none to justify the elements of
(..continued)
> applications, certificates, logbooks, reports, or records.
>
> (a) No person may make or cause to be made:
>
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part;
>
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating under this part[.]

[3]It is not clear from the record whether it was reduced to writing.

[4]The Equal Access to Justice Act, originally P.L. 96-481, 94 Stat. 2325 (October 21, 1980).

> allegations of conspiracy, fraud, and deceit[.][5] It could very well be, that in order to facilitate the termination of this proceeding the FAA used its power and influence to coerce a fee waiver to which it was not entitled.[6]

Initial decision at 3.

The Administrator argues on appeal that the settlement is a "special circumstance" that "make[s] an award unjust."[7] Petitioner reiterates that the settlement was coerced and, in light of various legal and policy reasons, he should not be bound by it. After a careful review of the record, we find that petitioner has not demonstrated that this settlement was coerced, and we agree with the Administrator that the EAJA claim should not be heard. Therefore, we need not discuss the Administrator's other claims of error in the initial decision.[8]

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[5]We find no indication in the record of charges of "conspiracy" or "deceit." These are petitioner's terms. They do not appear in 14 C.F.R. 61.59. We further note that, while petitioner consistently refers to FAA claims of "fraud," § 61.59 and the Administrator's order speak in terms of either fraud or intentional falsehood -- each of which requires different proof.

[6]This sentence contains no finding of fact. It states only a possibility of one. Thus, the law judge awarded fees without making the finding that is required even under petitioner's theory. On this ground alone, the initial decision is subject to reversal.

[7]See 5 U.S.C. 504(a)(1) ("An agency. . .shall award. . .fees and other expenses. . .unless. . .the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." (Emphasis added.) See also our rule at 49 C.F.R. 826.5(b).

[8]We deny the motion of the Aircraft Owners and Pilots Association ("AOPA") for leave to file an amicus curiae brief. As the Administrator notes in his reply in opposition, our rules authorize no such filing, nor would it be accepted if considered a petition to intervene. Not only is it untimely, but AOPA does not indicate any new or special insight it would bring to our decision that has not been raised by the existing parties.

This case raises a number of issues of first impression for the Board, notably whether an agreement not to seek fees is a special circumstance that would make such an award unjust, and issues regarding coercion in the settlement process. There is, however, considerable judicial advice regarding the availability of fee awards in the event of settlement.

We begin our analysis with the "special circumstance" test. The legislative history to EAJA explains:

> This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

S. Rep. No. 96-253, 96th Cong., 1st Sess., at 7 and H. R. Rep. No. 96-1418, 96th Cong., 2d Sess., at 11. In this case, the Administrator urges use of our discretion to deny awards on equitable, bad faith grounds.

We have found no precedent discussing settlement as a special circumstance to deny an EAJA award. However, the special circumstance language in EAJA is identical to that in the Fees Act,[9] another fee-shifting statute. Under the Fees Act, the special circumstance test has been applied to deny fees to prevailing parties when their conduct was "egregious,"[10] and when

[9]The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988.

[10]Skehan v. Board of Trustees of Bloomsburg State, 436 F.Supp. 657 (M.D.Pa. 1977).

counsel failed properly to produce or present relevant facts.[11] Special circumstances have also been found to be "the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose." Burke v. Guiney, 700 F.2d 767, 773 (1st Cir. 1983), citing Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978).

Under this equitable analysis, we have no difficulty with the general premise that it would be unjust to award fees where a settlement agreement provided to the contrary. Petitioner does not contest this general premise, but instead urges that his settlement was obtained under duress and for this reason should not be credited, thus adding another dimension to our analysis.

Before proceeding further, however, we must address a serious misconception on petitioner's (and the law judge's) part and one that affects the manner in which this case must be analyzed. In doing so, we discuss a case that has extensive application here, and one which neither party wholly integrates into the analysis. In that case -- Evans v. Jeff D., 475 U.S. 717 (1986) -- a fee waiver was approved despite the fact that the attorney for the class of civil rights plaintiffs contended that he had no real choice: a settlement very beneficial to his clients would have been threatened if he had not agreed to waive his fees. In his view, ethics required that he do so. The

[11] Bacica v. Board of Ed. of Sch. Dist. Etc., 451 F.Supp. 883 (W.D.Pa. 1988).

settlement provided relief for alleged deficiencies in the State of Idaho's education and treatment of children suffering from emotional and mental handicaps. The Court found no prohibition in the Fees Act against prevailing parties waiving statutory eligibility for fees. Id. at 730-731. It held that the opposite conclusion would discourage settlements -- an unwanted result.

Jeff D. is initially relevant in its directions regarding available remedies. Petitioner would have us preserve that part of the settlement favorable to him (the withdrawal of the complaint), and overturn only that part unfavorable to him (the fee waiver). Jeff D. indicates the unavailability of such a result. At best, petitioner could obtain vacation of the settlement agreement in toto, at which point trial would proceed in the absence of a new settlement agreement.[12] Thus, the outcome petitioner seeks and the law judge granted is not available. There are only two alternatives: affirm the settlement, including its waiver of EAJA fees; or vacate the settlement, in which case the parties could either try the case or negotiate a different agreement.

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[12]See Jeff D. at 726-727, esp. fn. 12 ("If the performance as to which the agreement is unenforceable [as against public policy] is an essential part of the agreed exchange, . . . the entire agreement [is] unenforceable").

Petitioner here takes a position similar to that taken by the Court of Appeals in Jeff D. and overturned by the Court. The Court noted: "Only by making the unsupported assumption that the respondent class was entitled to retain the favorable portions of the settlement while rejecting the fee waiver could the Court of Appeals conclude that the District Court acted unwisely [in approving the settlement]." Id. at 741.

Jeff D. is also illustrative in analyzing the merits of petitioner's claim of coercion. Absent real proof of improper behavior, Jeff D. encourages settlements, including those that include fee waivers, and even among parties whose bargaining power may be unequal.[13]

Petitioner correctly notes that, in Jeff D., the Solicitor General suggested that a fee waiver need not be approved when "defendant has no realistic defense on the merits" or where the waiver was part of a "vindictive effort . . . to teach counsel that they had better not bring such cases." Id. at 740. The Court, however, did not reach this argument.[14] Instead, it suggested a reasonableness test. Id. at 742.[15]

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[13]The Jeff D. Court (id. at fn. 20) cited with approval Judge Wald's concurring expression in Moore v. National Assn. of Security Dealers, Inc., 762 F.2d 1093, 1112 (D.C. Cir. 1985):

> [R]emoving attorneys' fees as a "bargaining chip" cuts both ways. It prevents defendants, who in Title VII cases are likely to have greater economic power than plaintiffs, from exploiting that power in a particularly objectionable way; but it also deprives plaintiffs of the use of that chip, even when without it settlement may be impossible and the prospect of winning at trial may be very doubtful.

[14]Here, as in Jeff D., there is no proof that the FAA had some vindictive effort to deter attorneys from representing individuals charged with fraudulent or intentionally false acts. There is not even such an allegation here.

[15]"We shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all relevant circumstances." This can include whether the FAA had a realistic position on the merits. The Court also suggested that one of the inquiries such an analysis raises is whether petitioner obtained an adequate quid pro quo for the waiver of attorneys'

Petitioner urges that the FAA knew its case had no evidentiary basis, that early in the proceedings petitioner had produced evidence that should have led to dismissal, and that the FAA used the threat of continued prosecution and legal fees to produce an agreement to waive EAJA rights. While this of course is possible in theory, we cannot credit petitioner's allegations or the law judge's findings.[16]

Neither petitioner's evidence nor argument provides a basis for concluding other than that the settlement reflects a reasonable bargain not obtained by coercion on the part of the government. Despite petitioner's (and the law judge's) characterization of the record, there is insufficient evidence to find that the Administrator had no reasonable basis on which to proceed. Even after the parties' informal conference, there were outstanding questions concerning petitioner's behavior and knowledge. See, e.g., Administrator's Memorandum of Points and Authorities in Opposition to Respondent's Petition for Assessment of Costs and Attorney Fees, at 2-3. Contrary to petitioner's suggestion that there was by that time unequivocal evidence absolving him, many of the disputed matters appear from the

(..continued)
fees. Id. at 741. All these matters are related to, and can also be encompassed in the analysis typically undertaken in, determining whether contracts have been freely entered. We address that approach infra.

[16]The Board is not bound by a law judge's factual findings when it cannot reconcile them with the evidence. See, e.g., Administrator v. Wolf, NTSB Order EA-3450 (1991).

record to involve credibility assessments.[17]

Petitioner received the benefit of dismissal of the charges, and it appears to be an adequate quid pro quo.[18] Applying Jeff D., we cannot find it unreasonable, on the record as made, for the Administrator to decline to dismiss the charges absent further investigation (via discovery or trial). The bargain may not be one that petitioner would have been most satisfied with or the one to which he believed himself entitled, but that is not the standard.[19]

And, the result would be no different were we to review the matter under general principles of duress in contracting, as the Administrator seems to suggest. Petitioner contends that the grounds for finding duress -- involuntary acceptance of the settlement terms, circumstances permitting no other alternative, and the circumstances being the result of coercive acts of the other party -- have been met here. The Administrator, while agreeing with this statement of the law, denies these criteria have been met. We agree with the Administrator. Duress is not

[17]There is considerable argument in petitioner's reply that is not substantiated in the record. It may be that petitioner had or had access to more documentary evidence than that contained in the record. We, obviously, are constrained by the record that has been presented formally to us.

[18]The Court in Jeff D. noted that "it was the 'coercive' effect of respondent's statutory right to seek a fee award that motivated [the settlement] offer." Id. at 741.

[19]Petitioner's Reply to Answer of Administrator suggests (at 8) that the decision to seek EAJA fees was made after the settlement, when counsel first learned of cases dealing with coerced settlement.

established by the facts that petitioner was interested in bringing the case to a conclusion; that he sought to prevent further legal fees from accruing; or that the FAA, a governmental body with greater resources, was the opposing party. We also see no evidence in the record to support petitioner's claim of "subtle but real threats by the FAA." Reply at 14.

We find equally unpersuasive petitioner's allegation that the FAA engaged in foot-dragging in prosecuting the case (and that this action was part of what petitioner considers to be "punitive action" by the FAA, causing petitioner economic harm). That it took 2 years from the date of the incident to issue the order of revocation is not unusual, nor is it grounds for either dismissal or fee award. Petitioner's characterization of the FAA's response to discovery is somewhat exaggerated. In any case, if petitioner was not satisfied with the timeliness of responses, his remedy was to file a motion to compel. He did not do so.

The record will also not support a finding (as petitioner alleges) that he risked financial ruin (Reply at 14) in proceeding rather than settling and, therefore, had no choice in the matter. Yet, the evidence in the record (Exhibit D to EAJA Application, which shows his assets, liabilities, income, and income sources) does not support this allegation, and we note from Exhibit D in this regard that petitioner was not relying solely on his certificates for his livelihood.

Having rejected petitioner's suggestion that coercion occurred in the settlement of this case, there is no basis to remand the matter (the only relief that would be available to petitioner). We will here apply our initial, general conclusion, and find that this settlement represents a special circumstance under which an award of EAJA fees and costs would be unjust.[20]

EAJA does not guarantee that a prevailing party will be compensated for its legal expenses. It grants a right to collect only some of those expenses[21] and, among other criteria, only if the government's position was not "substantially justified" -- a standard not coextensive with prevailing on the merits. Thus, absent settlement, petitioner could have prevailed in this proceeding on the merits after trial yet still not have received compensation for his attorneys' fees and costs.

As petitioner correctly notes, EAJA reduces the effect of the resource imbalance between private citizens and the federal

[20]Petitioner also cites Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985), to support his position that this case does not represent special circumstance. Lazar, however, preceded Jeff D.; it is not, however inconsistent. There, counsel for the plaintiff agreed to a settlement waiving fees, knowing full well he intended to violate that agreement and seek a fee award. He justified this action on grounds of duress, i.e., just as in Jeff D., he claimed no ethical choice but to accept a settlement favorable to his client but not to him personally. The court rejected this approach, suggesting that where duress was an issue, the court's review should be invoked at an earlier stage.

[21]Attorney and consulting fees in administrative proceedings now are capped (attorneys' fees at $75/hour). In judicial proceedings, the original statutory fee limit of $75 is typically raised to reflect inflation but still fails to provide 100 percent recovery of expenses.

government. Reply at 19. It does not, however, eliminate it or even attempt to do so. Thus, petitioner's argument from this premise -- that he does not have the legal duty to defend a "weak and tenuous" case -- is unconvincing. In fact, he has no "duty" to defend himself. What EAJA gives him is the opportunity to recover certain expenses if he does defend against the charges and the EAJA criteria later are met.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and

2. The initial decision, including its award of EAJA fees and costs, is reversed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.